



PUBLIC LANDS ADVOCACY

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Mr. Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality (CEQ)
722 Jackson Place, NW
Washington, DC 20503

VIA EMAIL: hgreczmiel@ceq.eop.gov

Re: Guidance on Categorical Exclusions

Dear Mr. Greczmiel:

On behalf of Public Lands Advocacy (PLA), following are comments on the proposed *CEQ Guidance on Categorical Exclusions* (CX) published in the *Federal Register* September 19, 2006. PLA is a nonprofit trade association whose members include independent and major oil and gas producers as well as nonprofit trade and professional organizations that have joined together to foster environmentally sound exploration and production on public lands. PLA supports CEQ's objective to provide clear, practical guidance to land management agencies for their use in determining actions that warrant categorical exclusion from the requirements of the National Environmental Policy Act (NEPA). The use of CXs has been held at bay for many years by some agencies due to fears of legal challenges by special interest groups regardless of the fact that CXs are a legitimate part of the NEPA process. We are pleased that CEQ has recognized this dilemma and is taking steps to reinstate their use because it will be now be possible for agencies to avoid many the redundant NEPA processes imposed on oil and gas producers across the country. CXs will also permit land management agencies to reduce staff time required for project approvals while allowing them to focus on other critical needs, such as inspection and enforcement of rules and regulations associated with land uses.

General

Before commenting directly on the proposed Guidance, it is necessary to raise an issue that has recently come to bear. There is great concern by many in industry that the proposed Guidance is intended to supersede the statutory CXs contained in the Energy Policy Act of 2005, specifically those outlined in Title III, Section 390. It is our understanding that such an action is outside the realm of CEQ's authority and it is NOT CEQ's intent. Therefore, it is crucial that CEQ clarify this issue in the *Introduction* section of the final Guidance.

Procedures for Establishing a New CX

The proposed Guidance indicates that federal agencies should consult with CEQ early in the CX development process and during review of substantive comments received on a proposed CX. It is

also indicated that for the consultation to successfully conclude, CEQ must provide a written statement that the final proposed CX was developed in conformity with NEPA and CEQ regulations. It could be construed that this written statement is tantamount to CEQ's approval of the CX. 40 CFR §1507.3(a) instructs federal agencies to consult with CEQ while developing their procedures and before they are published in the Federal Register. Therefore, it is evident that CEQ does not have authority to judge whether a CX is appropriate, rather it is limited to ensuring development of the CX conforms to the requirements of NEPA. PLA recommends this point be clarified when the final Guidance is published.

PLA does not agree that CEQ must be consulted in every case in which a land management agency contemplates the use of a CX. Many CXs have already been established, either by individual field offices or agencies, and are currently in use. It would be counterproductive for those CXs to be subject to this new Guidance. In our view, this Guidance would be best used when agencies contemplate the development of potentially controversial CXs rather than those currently in use or those applied as a result of technological advances.

Documentation

The stated intent on the first page of the Guidance is to “allow agencies flexibility in implementing the procedures for CXs that are adapted to the requirements of other applicable laws.” However, the Guidance itself sets out highly complex procedures for making CX determinations; of particular concern is direction to prepare what appears to be redundant documentation. We strongly recommend that CEQ simplify the Guidance by incorporating a simple checklist for all CXs that would be included in the administrative record. This checklist would oblige agencies to:

- Outline the purpose of the CX and the specific actions it would include
- Cite extraordinary circumstances that would curtail the use of the CX
- Cite examples of existing analyses that support the use of a CX or, alternatively, cite Field Office experience or other scientific information that supports the use of a CX
- Specify what types of federal monitoring actions would be used to validate the successful use of the CX or demonstrate that the CX is inappropriate
- Include a section that encapsulates the decision to create a new CX

A summary of this information would be included in the *Federal Register* notice wherein public review and comment would be requested. This information would also be provided to CEQ for its files.

In PLA's view, Benchmarking of private entities' experiences may be simply an added step that could be avoided. However, in cases where it is deemed necessary, it would be prudent to limit benchmarking to obtaining information from those with direct experience, i.e., state agencies, private landowners or project proponents. We also believe that justifying an existing CX is unnecessary unless it is accomplished through the agencies' periodic review discussed below in these comments. It is obvious that all relevant information would have already been considered when supporting details for the CX were reviewed. In general, we question the need to generate new information simply for benchmarking since it could serve to unnecessarily delay and complicate the process.

The proposed Guidance specifies that benchmarking data collection must meet the standards of the Information Quality Act. Does this mean that agencies would be required to initiate a data call to all

Field Offices or Ranger Districts for all CXs that would result in the agency having to review literally thousands of existing authorizations? It would seem appropriate for the agency office considering formulation of a new CX to rely on its own data rather than having to routinely poll all other offices each time a new CX is under consideration. It only makes sense to reach out to other offices when there is no reliable information available locally.

Public Involvement

“CEQ encourages Federal agencies to engage interested parties such as public interest groups, Federal NEPA contacts at other agencies, consultants, and Tribal, State, and local government agencies to share relevant data, information and concerns. The methods noted in 40 CFR § 1506.6 and other public involvement techniques such as focus groups, meetings, e-mail exchanges, conference calls, and web-based forums can be used to stimulate public involvement.” PLA is opposed this level of involvement for all CXs. Many future CXs may be technical in nature and would not require public involvement because nothing of value would be gained by their participation, merely lengthy delays in adoption and implementation. It is only appropriate to seek public involvement when development of a potentially controversial CX is at hand.

PLA candidly supports the current practice of the agencies not to seek public involvement in implementation of a CX because to do so would be redundant. Once a potentially controversial CX is vetted through the formal review process, there is no need for further public involvement when the CX is applied to an action. The agency will have already identified “extraordinary circumstances” when determining whether the use of a CX is appropriate. Involving the public in its use will merely serve to unduly delay its implementation, which defeats entirely the purpose of the CX. PLA strongly recommends that public involvement be limited to commenting on a proposed controversial CX rather than its employment as a means of streamlining the proposed process.

Use of an Established CX

We are pleased that *“CEQ discourages procedures that would require the preparation of additional paperwork to document than an activity has been categorically excluded.”* However, this section must also point out that once the parameters of a CX have been defined, no additional paperwork or public review is required. It has been the experience of many PLA members that the paperwork/documentation associated with an approved CX often takes longer to complete than preparation of a simple Environmental Assessment. It is important to note that many operators completely avoid requesting a CX for just this reason. Superfluous documentation results in protracted project delays while failing to add any intrinsic value to the process. Elimination of such redundancies is critical to the success of utilizing a CX; and, we recommend that CEQ examine procedures currently used by the Forest Service and BLM to help them meet the intent of a CX.

Impact Demonstration Projects

While Impact Demonstration Projects (IDP) could be of value, PLA recommends they be limited to those actions where the agency has no information, rather than “not having extensive experience,” in implementing and evaluating the effects of an action in order to assess whether a new CX is viable. It could be foreseen that the agencies could hide behind the implementation of countless IDPs as a means of avoiding making decisions on whether to use a CX.

CX Review

PLA supports the periodic review of existing CXs by land management agencies to ensure their proper use. Such a review would benefit both the agency and those who are interested in utilizing CXs. PLA's members are firm supporters of federal monitoring of approved land uses. However, they fail to see the value in the use of collaboration when monitoring and evaluating actions with non-federal entities unless it is limited to state and local agencies that must provide valid scientific evidence to support their findings. Allowing unscientific "views" to cloud the facts will not provide any value to the process and must be avoided.

Conclusion

PLA appreciates CEQ's challenge to clarify through Guidance how CXs should be formulated and used. It is our hope that the final Guidance, with our recommended changes, will be routinely used by all land management agencies in developing and implementing existing and new CXs. Their use in appropriate circumstances will help ensure unnecessary NEPA documentation is eliminated, thereby streamlining current processes. Such streamlining will result in cost-efficient and timely decisions being made by the agencies.

Again, we appreciate this opportunity to provide you with comments on the proposed *Guidance on Categorical Exclusions*. Do not hesitate to contact me should you have questions regarding our views or recommendations. Please note that PLA's offices have moved and our phone number has changed as indicated above on our letterhead.

Yours truly,

A handwritten signature in cursive script that reads "Claire Moseley".

Claire M. Moseley